LAW OFFICES

SHOOK, HARDY & BACON

REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

October 8, 1993

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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

103D CONGRESS

[1] PRO-KIDS Bill Added to HHS Appropriations Measure

On September 28, 1993, by a vote of 95-3, the Senate amended a House appropriations bill for the Department of Health and Human Services (H.R. 2518) with Senator Frank Lautenberg's (D-N.J.) PRO-KIDS legislation. Lautenberg's bill would restrict smoking to separately-ventilated areas in all federally-funded facilities providing services to children under the age of 18. It would apply to health care and day care programs and would include elementary and secondary schools.

During debate on the amendment, Senator Lautenberg referred to the EPA Risk Assessment on ETS and the lawsuit challenging the risk assessment. Quotations from the risk assessment were displayed on a chart. Senator Lautenberg also discussed the airline smoking ban, which he was instrumental in enacting, and claimed that airline employees have said that cabin air quality has improved since the ban went into effect. He did acknowledge, however, that there are "other environmental problems with indoor air on airplanes." EPA's July 1993 pamphlet, "What Parents, Decisionmakers and Building Occupants Can Do About ETS," was placed in the record.

Additional remarks made during the debate on the measure follow:

- *Senator Lautenberg*: "[Since the ETS risk assessment was released] companies, States, and localities have adopted policies to protect nonsmokers from this deadly carcinogen. Even four shopping malls in my State — Cherry Hill, Bridgewater Commons, Echelon, and Woodbridge Center — have gone smoke free and have attracted a lot of new customers as a result of that."
- *Senator Wendell Ford* (D-Ky.): "No one opposes protecting our children from harmful things they breathe in the air outside their homes. No one objects to that. But there is more in the air than tobacco. There should be equal concern about radon. We do not hear anything about that. There should be equal concern about asbestos, formaldehyde, lead, and other pollutants. But, no; we come in and beat on tobacco. We need to look at the comprehensive picture of workplace air quality, not just smoking."
- *Senator Jesse Helms* (R-N.C.): "[T]here is no justification for the Federal Government to rush into smoking bans based on EPA's questionable findings. EPA studies regarding tobacco are little more than antismoking diatribes in which science has been prostituted and readily ignored in order to have a politically correct result. The only thing these studies prove is EPA's willingness to sacrifice science in order to reach a predetermined ideology."
- *Senator John Chafee* (R-R.I.): "[The ETS risk assessment] concludes that the widespread exposure to environmental tobacco smoke presents a serious and substantial health risk. Secondhand smoke not only aggravates up to one million existing cases of childhood asthma each year but increases the risk of lower respiratory tract infections such as pneumonia and bronchitis. children are especially vulnerable to the effects tobacco smoke."

A conference committee now must resolve differences in the Senate and House versions of the appropriations bill. *See* BNA *Daily Report for Executives*, September 29, 1993.

[2] Conferees Strike PRO-FEDS Amendment to Treasury Appropriations Bill

As predicted by a number of Congressmen, Senator Frank Lautenberg's (D-N.J.) PRO-FEDS legislation was removed from a House appropriations bill for the Treasury Department (H.R. 2403) by a House-Senate conference committee. The PRO-FEDS legislation (S.

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262) would restrict smoking in all federal buildings to separately ventilated areas; it had been added to the appropriations bill by the Senate on August 3, 1993.

Proponents of S. 262 have reportedly said that they will resurrect the proposal during deliberations on other legislation during this session. *See Daily Labor Report*, September 27, 1993; *Chicago Tribune*, September 25, 1993.

U.S. Occupational Safety and Health Administration (OSHA)

[3] *ASH v. OSHA*: Court Denies Motion to Hold Case in Abeyance

The D.C. Circuit Court of Appeals has denied the Department of Labor's motion to hold the case in abeyance pending a decision by the Secretary as to "whether or how to regulate occupational exposure to tobacco smoke." The per curiam order, entered on September 15, 1993, grants ASH's motion to proceed with briefing and oral argument and instructs the Clerk to calendar the case for presentation to a merits panel.

ASH filed the underlying petition for review in December 1992 seeking an order that would require OSHA to institute a separate rulemaking to regulate ETS in the workplace. *ASH v. Department of Labor*, No. 92-1661 (U.S. Court of Appeals, D.C. Circuit) (filed December 22, 1992).

[4] Court Dismisses Suit Against Maryland OSHA

A trial court judge in Prince George's County has dismissed the suit filed by Albert Ertel against the Maryland Occupational Safety and Health Agency (MOSHA) to force that agency to ban smoking in private workplaces and to fine his employer for exposing him to ETS in the workplace. Further details about the pre-trial hearing conducted in the case appear in issue 54 of this Report, August 27, 1993.

In granting MOSHA's motion for summary judgment, the court stated that the decision to cite an employer under the state occupational safety and health statute is a matter of discretion. MOSHA's decision not to cite the employer was adequately supported by the results of MOSHA's inspection of Ertel's workplace, in which MOSHA found no evidence that the employer had violated the general duty clause of the statute, the court held. Thus, the court rejected Ertel's claim that MOSHA's decision was an arbitrary abuse of discretion.

The court also stated, in dicta, that the employer's subsequent decision to adopt a smoke-free policy would have rendered a mandamus proceeding moot. *Ertel v. Henry Koellein, Jr., et al.*, CAL 93-00073 (Circuit Court, Prince George's County, Maryland) (decided September 16, 1993).

[5] Reform Legislation Hearings Elicit IAQ Testimony

Testifying before a House subcommittee on OSHA reform, a representative of the American Federation of Teachers (AFT) addressed the issue of poor indoor air quality in schools. The hearing was held on September 28, 1993, before the subcommittee on Labor Standards, Occupational Health and Safety regarding the Comprehensive OSHA Reform Act (H.R. 1280). Two panels of witnesses testified during the hearing; one represented labor and the other represented industry.

Darryl Alexander of AFT discussed the IAQ problems in schools caused by poor ventilation, exposures to methyl alcohol, pesticides, commercial disinfectants and cleaners, asbestos, radon, and infectious diseases such as tuberculosis. She stated, "Indoor air quality is a critical problem for many of our schools. A requirement to inspect the work site could identify some of the problems that contribute to poor indoor air quality such as uncalibrated controls, filters that have not been cleaned or replaced, and improperly functioning air handling units."

Alexander blamed poor IAQ in schools for asthma, allergies and frequent respiratory infections, and she recommended passage of the reform act so that OSHA would have jurisdiction over workplaces not currently subject to OSHA regulation, such as schools, public facilities and hospitals.

Franklin Mirer, Ph.D., testifying on behalf of the United Auto Workers (UAW), also urged passage of the bill. He stated, "the rulemaking provisions in this legislation will get the OSHA standards process back on track. The bill properly adjusts the standards petition process by requiring OSHA to state reasons for *not* acting in response to substantial requests. Through

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all of OSHA's 23 year history, it was petitions from unions and the public health community which drove the positive rulemaking agenda at OSHA. . . . The definition of significant risk in the OSHA Reform Bill is based on environmental legislation and permits OSHA to provide workers the same level of protection against chemicals at work that EPA is required to provide to them at home."

Representative Austin Murphy (D-Pa.), who chairs the subcommittee, indicated that he expects the bill to go through lengthy markup in October or November 1993, and anticipates it will be substantially amended.

[6] Predictions Made About Workplace Smoking Standard

According to an article appearing in the current issue of *Occupational Health & Safety*, one of the more contentious issues facing OSHA is smoking in the workplace. Charles Adkins, director of OSHA's health standards programs, is quoted as saying, "We're in the process of looking at various options. Options [include] a standard on passive tobacco smoke alone, or doing a standard on indoor air quality that would include passive tobacco smoke. The flip side is not doing anything at all." This option is not seen as likely, but Adkins also said, "We would rather do something on our schedule than have somebody mandate that we do something within an unreasonable period of time."

Richard Boggs, vice president of Organization Resource Counselors Inc., a Washington, D.C.-based management consulting firm, has reportedly predicted that there will be some kind of standard restricting smoking in the workplace. In this regard, he stated, "I don't think there's much question anymore that smoking is hazardous to your health, whether it's secondary or whatever." *See Occupational Health & Safety*, September 1993.

WHITE HOUSE

[7] New Executive Order Focuses on Regulatory Planning and Review

Vowing to reform the regulatory process and make it more efficient, President Clinton has signed an executive order that sets forth his Administration's regulatory philosophy and establishes the procedures to be followed by agencies in promulgating regulations. "We reject the 'if it moves, regulate it' approach. And we reject the idea that we can walk away from regulation entirely. We have sought a third way, consistent with the philosophy behind the Vice President's reinventing government project," the President said before he signed the order.

Under the order, which was signed on September 30, 1993, the Office of Management and Budget (OMB) plays a larger role in regulatory planning but is restricted in its ability to block specific regulations. OMB is an executive-branch agency that controls the administration of the federal budget and coordinates management procedures among federal departments and agencies.

President Clinton's order calls for annual regulatory plans developed by each federal agency in cooperation with the OMB. The plans are to specify an agency's regulatory agenda and describe the costs and benefits that anticipated rules are expected to produce. Specifically, the plan must include a "statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency," the order states.

With respect to specific proposed regulations, the order permits the Vice President's review only at the request of a cabinet member or the OMB. Communications between White House staff members and the public must be made in writing and put in the public record in order to be utilized in the rulemaking process.

[8] Proposed Cigarette Tax Seen as Benefit for Nonsmokers

President Bill Clinton has proposed adding a tax on cigarettes as part of his health care plan. Several commentators have praised the plan as a benefit to nonsmokers who will purportedly be exposed to less ETS if the increased cost of a pack of cigarettes reduces the number of smokers. Commenting on the proposal were:

- *Former Surgeon General C. Everett Koop*: "A substantial cigarette tax would benefit not only the entire nation by helping to provide more accessible health care at a lower cost, but it would also benefit

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particular groups; smokers would benefit because it would help them to quit; nonsmokers would benefit because the air they breathe would have less harmful smoke;... The only real losers would be the tobacco industry, which has made its profits by lying to the American people about the dangers of smoking." *See The Washington Post*, September 21, 1993.

- *Surgeon General Joycelyn Elders*: "We know that children exposed to tobacco smoke are far more likely to have pneumonia or other respiratory diseases. We know that. And yet we as a government continue to subsidize the tobacco industry. And when we talk about tax on tobacco, we know that it costs us $2.13 in increased medical costs, and we scream when we are talking about taxing tobacco. All other industrialized countries have a higher tobacco tax than the United States, and yet we say, we'll lose our tobacco farmers." *See Federal News Service*, September 27, 1993.
- *Stanton Glantz*: (responding to a remark about whether the new tax on cigarettes should fund antismoking efforts) "They would be absolute idiots to not include a reasonable tobacco-control campaign as a component of their overall health care proposal." *See* ABC *World News Tonight*, September 21, 1993.

U.S. Environmental Protection Agency (EPA)

[9] *ETS Risk Assessment Litigation*: Washington Legal Foundation Tenders Amicus Brief in Support of Plaintiffs

Washington Legal Foundation (WLF), a nonprofit public interest law and policy center, is seeking leave of court to file an *amicus curiae* brief in opposition to EPA's motion to dismiss. WLF filed its motion for leave on October 4, 1993; WLF's proposed brief was attached to the motion.

"WLF believes that businesses who are the victims of the type of deceitful government conduct that is alleged in this case ought to be permitted to obtain judicial review of that conduct, particularly where (as here) the conduct inarguably has a profound effect on those businesses," the organization stated in its papers. "WLF believes that denial of judicial review in the face of those allegations would place in jeopardy the economic and civil liberties of all individuals and businesses."

The brief which the legal foundation proposes to file addresses two of the procedural issues raised in the motion to dismiss: (i) whether EPA's decision to designate ETS as a Group A carcinogen constitutes "final agency action"; and (ii) whether the case is "ripe" for review. "[EPA]'s motion to dismiss this Complaint boils down to a claim that the federal government can avoid all judicial review of official pronouncements that label an industry's product with a pejorative designation that the government allegedly knows to be false, when the government acts for the purpose of damaging that industry, when the industry does, in fact, suffer damage. That churlish approach to judicial review of government action has never been the law, nor should it be," WLF asserts.

On August 30, five organizations sought leave to file an *amicus* brief in support of EPA's motion to dismiss. The court has not yet ruled on that request, or on WLF's request.

Plaintiffs filed their response to the motion to dismiss on September 20. EPA's reply brief, if any, is currently due on October 20.

Plaintiffs' complaint in this case seeks a declaration that EPA's decision to designate ETS a Group A carcinogen, together with the risk assessment on which the decision is based, is unauthorized, arbitrary and capricious, violates procedures required by law, and amounts to a denial of due process. Plaintiffs also seek a permanent injunction requiring EPA to withdraw the Group A designation and the underlying risk assessment. *Flue-Cured Tobacco Cooperative Stabilization Corporation, et al., v. EPA*, No. 6:93CV370 (U.S. District Court, Middle District, North Carolina) (filed June 22, 1993).

[10] Controversy Mounts Over EPA Cabinet Elevation Bill

According to a press report, the Clinton administration has informed the House that it opposes a risk assessment provision that has been added to the EPA Cabinet elevation bill (S. 171) by amendment. Further details regarding the bill appear in issue 47 of this Report, May 14, 1993. The amendment would require the new Department of Environmental Protection to

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conduct risk assessments and cost-benefit analyses for all proposed regulations. The Senate approved the amendment by a vote of 95-3, but House opposition led by Representative Henry Waxman (D-Calif.) has been strong and is expected to persist if the amendment reaches the conference committee.

Although President Clinton is reportedly strongly committed to placing the EPA in his cabinet, he is opposed to amendments that do not address organizational matters for the new department. Some congressional sources, however, believe that there is a great deal of support for the risk assessment amendment in light of overburdened state and local budgets, and that Vice President Gore's "reinventing government" report may actually provide a boost for the amendment. *See Inside EPA*, September 24, 1993.

Meanwhile, Senator John Glenn (D-Ohio), sponsor of the bill has reportedly expressed some reservations about the "new science" of risk assessment upon which every EPA regulation is relying. He apparently believes that Congress should be cautious about adopting a scientific methodology that has not been universally accepted. According to Glenn, the EPA Cabinet bill can be completed before the end of the year. Any additional delays can apparently be attributed to other issues before Congress, including the budget and health care. *See Inside EPA*, October 1, 1993.

[11] EPA Fails to Address Residual Effects of Fugitive Perc Emissions

According to a press report, the EPA, in releasing its first national emissions standard for hazardous air pollutants under the 1990 Clean Air Act amendments, failed to address the residual effects of percholorethylene (perc) emissions on apartments and offices adjacent to dry cleaners. A New York study apparently found high levels of perc in the indoor air of apartments and businesses located above small dry cleaning establishments. The estimated cancer risk at those sites was reportedly as high as one in 100.

The EPA's latest rule only addresses the effects of perc emissions inside dry cleaning establishments. It simply prohibits dry cleaners from buying transfer machines, consisting of washers and dryers, when they replace their equipment as such dry cleaning systems release more perc than dry-to-dry machines. *See Indoor Pollution News*, October 1, 1993.

[12] Anderson Carpet Studies Not Replicated

The EPA has reportedly found no proof, following months of study, that chemical emissions from carpeting cause illness or death in mice. The EPA's findings, released in September 1993, thus failed to confirm findings made earlier in the year by Massachusetts-based Anderson Laboratories. Some 50 experiments involving 250 mice apparently did not replicate the Anderson results. A professor at the University of Pittsburgh, however, has apparently testified that mice have died during experiments he has devised. His methodology has reportedly been criticized by the EPA. *See The Atlanta Journal and Constitution*, September 18, 1993.

State and Local Governments

[13] Assessments of Chemical Risk to be Peer-Reviewed in California

The California Secretary for Environmental Protection announced that California EPA's Office of Environmental Health Hazard Assessment (OEHHA) will establish a Science Advisory Board (SAB) of external scientists to peer review OEHHA's scientific assessments of chemical risks. The SAB will apparently review risk assessment guidelines, risk assessment documents on specific chemicals, and scientific policy developed by OEHHA. The SAB has been charged with promoting sound risk assessment science in regulatory decision-making and with fostering consistency throughout the environmental agency.

The two SAB committees formed initially will serve as the state's qualified experts under Proposition 65 and will identify chemicals that may cause cancer or birth defects and are subject to the provisions of Proposition 65. Experts have been named to the committees, one of which will reportedly meet for the first time on October 25, 1993, in Sacramento. *See PR Newswire*, September 24, 1993.

[14] Privacy Legislation

•Pennsylvania

A bill introduced in March that would have prohibitec employment discrimination against persons who use lawful products moved out of the House Committee on Appropriations but, after several readings and

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amendments, failed to pass the House. *See* H.B. 956, 176th Gen. Assem. Reg. Sess. (1993-94).

[15] ETS-Related State and Local Legislation

•Local Governments in California

Calabasas. On September 22, 1993, the City Council unanimously approved a law banning smoking in restaurants and most public places, including stores and other buildings open to the public. The ordinance takes effect on October 22. Mayor Marvin Lopata proposed the ordinance; it's timing he said, due partly to a smoking ban approved in Los Angeles and partly to an agreement with Mayor Ed Kurtz of Agoura Hills, which approved a restaurant smoking ban last month. *See Los Angeles Times,* September 25, 1993.

Laguna Hills. A city ordinance banning smoking in most public buildings, which was to go into effect September 24, 1993, was opposed by a group called the Committee for Better Restaurants, Business and Jobs. The group submitted a petition to the city clerk's office in an effort to force a referendum; however, the petition failed because the number of valid signatures on the petition fell short of the required minimum. The ordinance is now in effect and prohibits smoking in virtually "all enclosed areas available to and customarily used by the public." *See Los Angeles Times,* September 13, September 24 and October 2, 1993.

Long Beach. A smokers' rights group has gathered enough signatures to force the City Council either to repeal or weaken an antismoking ordinance approved in July, or to place it before voters on the April 12, 1994, municipal ballot. The council also has the option to pass a weaker measure now and seek voter approval of the original ordinance in April. The matter has been put on hold because some council members want to put the measure on the ballot, but others would prefer to modify it. *See Los Angeles Times,* September 23, 1993.

Los Angeles. On September 20, 1993, an appellate court allowed the city clerk's office to stop counting signatures on a referendum petition challenging the smoking ban in restaurants. The Court of Appeal issued a stay of a lower court's order for the city to count more than 90,000 signatures on the petition, which calls for the ban to be put before voters on November 2. The requirement that circulators of the petition must be registered Los Angeles County voters was ruled unconstitutional in a lower court, and a hearing before the Court of Appeal is pending. Meanwhile, the smoking ban in restaurants remains in effect. *See Sacramento Bee,* September 21, 1993; *Los Angeles Times,* September 21, 1993.

San Francisco. According to a news report, restaurant owners and representatives of the tourism industry strongly oppose Supervisor Angela Alioto's proposed legislation to ban smoking in all workplaces in the city. The proposal would ban smoking in restaurants, bars and in sports arenas with seating capacities of more than 30,000, including Candlestick Park. Alioto referred to the EPA Risk Assessment on ETS to support her proposed legislation.

According to Jeffrey Tannenbaum, one of the attorneys who successfully challenged a local ordinance which would have regulated video display terminals, the state's labor code preempts any local regulation of workplace health and safety and thus may preempt local ordinances that attempt to regulate smoking in the workplace.

The Code designates the Occupational Safety and Health Standards Board as the only agency in the state authorized to adopt workplace health and safety standards. According to a spokesperson for a nonsmoker's rights group, however, the Health and Safety Code of the state provides that local regulation of tobacco use is not preempted unless local ordinances conflict with state law.

A second hearing on Alioto's proposal was held on September 28, 1993. *See BNA California - Safety & Health Report,* September 27, 1993.

San Juan Capistrano. The Committee for Better Restaurants, Business and Jobs has opposed a city ordinance banning smoking in public buildings and claims to have collected enough signatures to keep the ordinance from taking effect. The ordinance prohibits smoking in virtually "all enclosed areas available to and customarily used by the public" and bans cigarette vending machines. The group has collected more than 1,215 names of registered voter residents required to put the ordinance on hold. If the petition is ruled valid, the council will be required to put the ordinance before voters in a referendum at a special election or the next regular election in June. *See Los Angeles Times,* September 23, 1993.

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•Local Governments in Hawaii

Honolulu. The City Council has introduced an ordinance to extend prohibitions against smoking to include restaurants. The ordinance cites the EPA Risk Assessment on ETS in support of the new prohibition. *See* Honolulu City Bill No. 93, 1993.

•Local Governments in Maryland

Howard County. On September 20, 1993, the Howard County council overrode County Executive Charles Ecker's veto of a measure that prohibits smoking in most public places, including office common areas, stores, museums, public restrooms and beauty and barber shops. The bill's provisions will be phased in through July 1, 1996. At that time the law will require restaurant and bar owners to ban all smoking unless they can separate bar areas and equip them with special ventilation systems. Council members defended their action "as a necessary step to curb the health hazard associated with exposure to other people's tobacco smoke." *See The Washington Post,* September 21, 1993; *Baltimore Morning Sun,* September 21 and 28, 1993.

•Pennsylvania

The Senate State Government Committee has scheduled four public hearings to consider legislation that would strengthen Pennsylvania's Clean Indoor Air Act. The committee chairperson, Senator Allyson Schwartz (D-Phil./Montgomery), attributed the effort to strengthen the Act to, the EPA Risk Assessment on ETS. "It's time for the General Assembly to take a hard look at the dangers of secondhand smoke and decide if the Clean Indoor Air Act adequately protects non-smokers in public places," she is quoted as saying. Senate Bill 1217 would ban smoking in state buildings and would restrict smoking in public places by requiring a separately enclosed smoking room with separate outside ventilation. *See PR Newswire,* September 24 and 30, 1993.

•Local Governments in Pennsylvania

Philadelphia. Mayor Edward Rendell announced that beginning November 18, 1993, smoking will be prohibited in any city-owned buildings to which the public has access, such as libraries, recreation centers and health centers. Rendell stated he was instituting the ban by executive order based on "incontrovertible" medical evidence on the dangers of ETS. *See Philadelphia Inquirer,* September 21, 1993.

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[16] *Broin:* Depositions of Senior Executives Scheduled

Depositions of senior executives of some of the defendants are scheduled to begin on October 11, 1993, with deponent William Campbell, president of Philip Morris Incorporated. On October 12, the current President of RJR Nabisco, Inc., and Michael Rosenbaum, a Vice President of Liggett Group, Inc., are to be deposed. On October 14, Farrell Delman, President of the Tobacco Merchants Association, and Andrew Tisch, President of Lorillard Tobacco Co., are to be deposed. This series of depositions is scheduled to conclude on October 15 with the deposition of Martin Orlowsky, Executive Vice President of Lorillard Tobacco Co.

Meanwhile, plaintiffs' appeal of the trial court's dismissal of their class allegations remains pending in the Third District Court of Appeal. A decision is expected at any time.

At issue in this case are the claims of 28 flight attendants allegedly injured by occupational exposure to ETS. In addition, the husband of one of the flight attendants claims loss of consortium. The 28 attendants purport to represent a class of approximately 60,000 other attendants.

Injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. Plaintiffs further allege that occupational exposure to ETS on board aircraft causes at least 22 diseases and a reasonable fear of contracting such diseases. The defendants are purported to be the six major U.S. cigarette manufacturers (plus related entities), UST, Inc., United States Tobacco Company, Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three trade associations. *Broin, et al., v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

[17] *Butler:* Deposition of Plaintiff Ava Dean Butler Noticed

Defendants have noticed plaintiff Ava Dean Butler for deposition on October 20, 1993. Plaintiffs had sought a protective order regarding the deposition, but Judge Gibbs denied plaintiffs' motion on September 10. Defendants deposed the plaintiffs' three daughters on October 5 and 6. They deposed the present owner of Burl Butler's former barbershop on October 4.

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Plaintiffs contend that Burl Butler, a barber from Laurel, Mississippi, developed lung cancer as a result of his exposure to ETS. The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

[18] *Dunn*: Responses to Defendants' Dispositive Motions Filed

On September 24, 1993, plaintiffs submitted their responses to defendants' pending motions: a joint motion to transfer venue from the Circuit Court of Delaware County to the Circuit Court of Grant County, which was filed by the cigarette manufacturing defendants, The Tobacco Institute and the Council for Tobacco Research; and motions to dismiss for lack of personal jurisdiction, filed by the various holding company defendants. Pursuant to the current scheduling order, defendants have until October 27 to submit their reply briefs. The court is presently scheduled to hear argument on the motions on December 2.

Plaintiffs in this case contend that Mildred Wiley was a nonsmoker who died of lung cancer in 1991 as a result of exposure to ETS at the Veteran's Administration hospital where she worked. Her husband, Philip Wiley, is also asserting a loss of consortium claim. Defendants in the case are each of the six major U.S. cigarette manufacturers, parent companies of three of the manufacturers, The Tobacco Institute, and the Council for Tobacco Research. *Dunn v. RJR Nabisco Holdings Corporation, et al.* (Superior Court, Delaware County, Indiana) (filed May 28, 1993).

[19] *Voth*: Motions to Dismiss Filed

On September 27, 1993, Philip Morris Companies Inc. filed a motion to dismiss plaintiff's amended complaint for lack of personal jurisdiction. On September 21, defendants R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco Company d/b/a Forsythe Tobacco Products, and Brown & Williamson Tobacco Corporation filed a joint motion to strike plaintiff's amended motion for preliminary injunction, which seeks to ban the sale of cigarettes in the state of Oregon. In their motion, the defendants contend that plaintiff's motion for a preliminary injunction should be stricken as moot, redundant, harassing and frivolous because he is housed in a nonsmoking area of the penitentiary. Also on September 21, R.J. Reynolds filed a motion seeking the entry of a scheduling order "to bring some order to the case and to ensure that the parties have a clear understanding of what is expected of them and when." The court has not ruled on any of the above motions.

Frank Voth, who is incarcerated in the Oregon State Penitentiary, alleges that his civil rights have been violated as a result of his exposure to environmental tobacco smoke. He claims that he has "incurred permanent health damage and is at risk of death" as a result of being exposed to environmental tobacco smoke. Defendants in *Voth* are Forsyth Tobacco Products, R.J. Reynolds, Brown & Williamson, Philip Morris Companies and American Tobacco. *Voth v. Forsyth Tobacco Products, et al.* (U.S. District Court, Oregon) (filed April 27, 1993).

ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

AMERICANS WITH DISABILITIES ACT (ADA)

[20] *Harmer v. Virginia Electric and Power Co.* (U.S. District Court, Eastern District, Virginia) (decided September 20, 1993)

The district court has granted a motion for summary judgment filed by the defendant-employer in this case and has dismissed the plaintiff's complaint with prejudice. Plaintiff Robert Harmer had alleged that his employer, Virginia Electric and Power Co. (Virginia Power), violated the Americans with Disabilities Act (ADA) by failing to prohibit smoking in the building in which he worked. Further details regarding the complaint appear in issues 43 and 45 of this Report, March 19 and April 16, 1993.

Harmer's complaint alleged that he had bronchial asthma and that a complete smoking ban was necessary under the ADA to accommodate his condition. The court found, however, that Harmer could do his work as a buyer in the company's purchasing department without a smoking ban. In its order, the court ruled, "[B]ecause the evidence established that Harmer could at all times adequately perform his employment duties,

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